

grant EPN an Interim Ruling that requires SWBT to provision facilities to wireless carrier cell sites as UNEs for the duration of this proceeding. Such relief is consistent with the standard for such a ruling provided for in PUC PROC R. § 22.328 because without such relief EPN will be precluded from provisioning scheduled service to its wireless carrier customer.

A. ARGUMENT

1. The Waller Creek Agreement Contemplates Access to Carrier Locations as Unbundled Network Elements – Either Transport or Loops

SWBT contends that facilities to wireless tower sites can *only* be ordered *as* special access circuits (SWBT Complaint at 6-7); in other words, it contends that there is *no* way to obtain these facilities *as* UNEs. The Commission’s past rulings, and the provisions of the FTA, demonstrate that SWBT is wrong. Indeed, the result SWBT seeks would deny the benefits of competition under the FTA to wireless customers in Texas.

(a) EPN May Obtain Unbundled Access to SWBT Facilities Serving Other Telecommunications Carriers

In 1999, the Commission squarely addressed whether EPN’s existing interconnection agreement allows it to use unbundled network elements (“UNEs”) to provide wholesale access services. The Commission unequivocally stated yes. In the Waller Creek Reconsideration Order, the Commission stated that it will “allow WCC to provide wholesale access service to any telecommunications provider.”²³ The Commission further stated that “WCC, therefore, is entitled to acquire UNEs from SWBT for providing wholesale access service.”²⁴

complaint is required under P.U.C. PROC. R. § 26.326, however, EPN respectfully requests that this Response and Counterclaim be treated as such a complaint, and docketed accordingly.

²³ Waller Creek Reconsideration Order at 7.

²⁴ Id.

The *Waller Creek Reconsideration Order* recognized that Waller Creek intended to **pro-**vide “wholesale access service” to other carriers, specifically including wireless carriers. In explaining its legal analysis, the Commission stated that “[n]either the AT&T/SWBT agreement, the Clarification Order, the WCC/SWBT agreement, nor the FTA interpretations cited by SWBT prohibit **or** circumscribe WCC’s ability to provide wholesale access services to other CLECs, data carriers, *wireless carriers*, **or** other non-LXC retail **carriers**.”²⁵ There should be no dispute that the *Waller Creek Reconsideration Order* compels the result EPN requests in this motion.

The Arbitrators in Docket No. 25188 have specifically affirmed that the rule in the *Waller Creek Reconsideration Order* remains the law in Texas. As stated in the Revised Arbitration Award, “EPN may continue to purchase UNEs, and use them, alone **or** in combination with their own facilities, to provide wholesale services to other **providers**.”²⁶ The Commission should **not** permit SWBT to undermine that ruling by allowing it to define away its legal obligation to provide unbundled access to its network elements.

(b) **SWBT Facilities Serving Wireless Carrier Cell Sites Are
“Network Elements” That Must Be Unbundled.**

SWBT argues in its Complaint that circuits serving cell sites are not “UNE loops” **as** defined in the parties’ existing Interconnection Agreement. Although that argument is wrong, **as** discussed in the following section, SWBT fails to address the broader question of whether these circuits are “network elements” that are subject to FTA § 251(c)(3). The answer to that question is “yes.”

²⁵ *Id.* at 7 (emphasis supplied).

²⁶ Docket No. 25188, Revised Arbitration Award at p. 15.

The definition of “network element” in the **1996** Act, and **as** implemented by the FCC, clearly encompasses the facilities requested by EPN. The **1996** Act defines “network element” **as** “a facility **or** equipment used in the provision **of telecommunications service.**”²⁷ SWBT transmission equipment connecting a wire center to a cellular tower site is certainly a facility, and it plainly is “**used** in the provision of a telecommunications **service.**” SWBT does not even attempt to contradict the obvious conclusion that § 251(c)(3) requires that these facilities be made available on an unbundled basis. Instead, it simply ignores the issue, and resorts to definitional chicanery to try to exclude these circuits from the category of “UNE loops.”

Further, contrary to SWBT’s suggestion, the FCC’s unbundling policies were not intended to exclude wireless carriers from the benefits of competition. Under FCC rules and orders, wireless carriers can qualify as requesting carriers under § 251; they provide telecommunications service, and thus may obtain interconnection and access to unbundled network elements from ILECs.²⁸ The FCC’s reasoning was based in part on the statutory command that its rules should be technologically neutral. As the FCC explained in the *Local Competition Order*, “all telecommunications carriers that compete with each other should be treated alike regardless

²⁷ 47 U.S.C. § 153(29).

²⁸ *Implementation of the Local Competition Provisions of the 1996 Act*, CC Docket 96-98, First Report and Order, FCC 96-325, 11 FCC Rcd at 15989-16016, ¶¶ 993 (“all CMRS providers are telecommunications carriers and are thus obligated to comply with section 251(a). These carriers meet the definition of ‘telecommunications carrier’ because they are providers of telecommunications services **as** defined in the **1996** Act and are thus entitled to the benefits of section 251(c), which include the right to request interconnection and obtain access to unbundled elements at any technically feasible point in an incumbent LEC’s network.”); *see also id.* at ¶¶ 1012, 1041 (finding that CMRS carriers are telecommunications carriers) (“*Local Competition Order*”).

of the technology used.”²⁹ It would therefore be absurd to interpret the FCC’s rules, as SWBT suggests, to preclude unbundling of circuits based on the type of carrier the circuit serves.

The Commission should not allow SWBT to avoid its statutory obligations. Facilities serving cell sites must be available as *some* form of UNE under the parties’ Agreement. That Agreement was intended to implement **SWBT’s** obligations under Section 251 of the 1996 Act. As a result, the Agreement must be interpreted in a manner consistent with the purposes of Section 251(c) of the 1996 Act, which requires **SWBT** to provide any requesting telecommunications carrier unbundled access to network elements.

(c) **The Existing Interconnection Agreement Allows EPN to Obtain UNE Loops to Wireless Carrier Cell Sites**

SWBT’s interpretation of the parties’ existing Agreement excludes circuits serving cell sites from the definition of “UNE Loop,” based on the fact that the term “end user” appears in that definition. However, the plain language of the Agreement does not support SWBT’s argument.

Under Texas law, when construing a contract, the “primary concern is to ascertain the true intentions of the parties as expressed in the written instrument.”³⁰ If the written contract is “worded so that a court can give it a certain or definite legal meaning or interpretation, it is not ambiguous.”³¹ When a written contract is unambiguous, extrinsic evidence “will not be received

²⁹ *Local Competition Order* ¶ 993.

³⁰ *Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, 925 S.W.2d 565, 575 (Tex. 1996).

³¹ *Weingarten Realty Investors v. Albertson’s Inc.*, 66 F. Supp.2d 825, 840, (S.D. Tex. 1999), *aff’d*, 234 F.3d 28 (5th Cir. 2000).

for the purpose of creating an ambiguity **or** to give the contract a meaning different from that which its language **imports**.”³²

Here, the contract is unambiguous. The Agreement defines an end user **as** “a third-party residence or business that subscribes to Telecommunications Services provided by either **of** the Parties, ... or any other entity that **is** treated **as** an ‘End User’ by Commission or FCC rules.”³³ A wireless carrier qualifies **as** a “End User” under that definition—it is obviously a business, not a residence, and it is a “third-party,” not a party to the Agreement. It also subscribes to Telecommunications Services, since it currently purchases service from SWBT and **has** ordered service from EPN. By the plain language of the document, therefore, EPN’s customer is an “End User.” Even if this definition did not clearly answer the question, the Agreement provides that “End User” will include “any other entity that is treated **as** an ‘End User’ by Commission or FCC rules.”³⁴ As noted above, the *Waller Creek Reconsideration Order* specifically permits EPN to provide wholesale access services to other carriers. Thus, by Commission rule, such carriers are equivalent to “end users” under the definition of that term in the parties’ existing Agreement. No amount of manipulation of that definition by SWBT changes this fact.”

³² *Weingarten*, 66 F. Supp.2d at 840, citing *Universal C.I.T. Credit Corp v. Daniel*, 150 Tex. 513, 243 S.W.2d 154, 157 (1951).

³³ EPN-SWBT Interconnection Agreement, As amended August 10, 2001 (hereinafter “ICA” or “Agreement”) General Terms & Conditions (“GT&Cs”) § 53.5, copy attached hereto as Exhibit 2.

³⁴ ICA GT&Cs at § 53.5.

³⁵ Compare, for example, the definition of “end user” in the current agreement and the definition of “end user” the parties agreed to use in the new Interconnection Agreement currently in arbitration in Docket No. 25188. That definition, **proposed** by SWBT, adds the term “at retail” to the definition. However, the new Agreement also provides explicitly that EPN may use UNEs to serve any “Customer,” not just an “End User.” *See* Docket No. 25188, EPN and SWBT Joint Filing of Conformed Interconnection Agreement, General Terms and Conditions, § 1.1.51, (continued)

Although SWBT attempts to introduce ambiguity into the definition of end user in the Agreement, claiming that “end **user**” must have some additional connotation that is not expressed in the definition, under Texas law an ambiguity does not arise merely because “parties advance conflicting interpretations of the **contract**.”³⁶ A contract is only ambiguous if the written instrument “remains reasonably susceptible to more than one meaning.”

The definition of end **user** in the agreement is not “reasonably susceptible to more than one meaning” despite SWBT’s proffer of an **alternative** explanation. SWBT’s explanation, which relies on an alleged **common** use of the term, is not reasonable **as** matter of law because when a contract uses particular definitions those definitions replace ordinary and common meaning? Thus, the ordinary and **common** meaning of the term “end user,” even assuming *arguendo* that SWBT’s position **as** to that meaning is correct, has no bearing on the meaning of that term within the Agreement. Indeed, even if SWBT were to prove the definition is ambiguous, it has offered no evidence showing that the parties intended the definition to mean something other than what is apparent from its plain language.

Accordingly, SWBT cannot prohibit EPN from purchasing UNEs that provide access to those carriers’ locations, including cell sites, **or** require that such access be provided solely over special access facilities.

filed Aug. 16, 2002. The term “at retail” is not in the current Agreement because it would be inconsistent with the Commission’s ruling in the *Waller Creek Reconsideration Order*.

³⁶ *Weingarten*, 66 F. Supp.2d at 840.

³⁷ *R&P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 519 (Tex. 1980).

³⁸ *Phillips Natural Gas Company v. Cardiff*, 823 S.W.2d 314, 317 (Tex. Ct. App. 1991), *reh’g denied*, (“when a written agreement contains an express provision, the written agreement, not the common law on that subject, controls.”). See *Western Reserve Life Ins. v. Meadows*, 152 Tex. 559, 261 S.W.2d 554, 557 (1953).

(d) If Network Elements That Terminate at Cell Sites Are Not “Loops” Then They Must Be Entrance Facilities

As already discussed, SWBT devotes its Complaint solely to arguing that the circuits ordered by EPN are not “loops,” while carefully omitting any discussion of whether they might constitute **some** other **type** of **UNE**. As EPN has shown, the circuits are “loops” **as** defined in the Agreement.

Even assuming *arguendo*, however, that circuits to cell sites did not qualify as loops, the Commission would still have to determine whether they constitute another form of UNE under the existing Agreement. In particular, **the** category of “entrance facilities” in the unbundled dedicated *transport* UNE category would appear to fit these circuits because they connect a SWBT wire center to a wireless carrier’s point of presence. Entrance facilities generally provide a dedicated connection between a SWBT facility and another carrier’s facility. SWBT’s course of performance under the Agreement, however, has been to treat most circuits to carrier locations as loops (**as** discussed in more detail in the next section). In the past, EPN ordered DS1 and **DS3** facilities to serve carrier locations **as** UDT entrance facilities?’ However, SWBT refused to provide unbundled entrance facilities to carrier locations unless there was a switch located at the site. Therefore, EPN began requesting DS1 facilities to other carrier locations as loops consistent with SWBT’s interpretation.⁴⁰

³⁹ Manias Affidavit ¶ 11.

⁴⁰ “SWBT’s position that DS1 facilities are not available as DS1 UNE loops appears to be a reversal of SWBT’s policy, under the Waller Creek/EPN Interconnection Agreement, of forcing EPN to purchase loops rather than entrance facilities to carrier locations where there is no carrier switch present. Under the existing agreement, SWBT has required EPN to order such loops and that is how SWBT’s **OSS** handles such requests.” Affidavit of Pantios Manias, ¶ 11 (filed Oct. 21, 2002), copy attached hereto as Exhibit 3.

SWBT cannot have it both ways. If circuits to cell sites are not “loops” because the wireless carrier is not an end **user**, then they must be “entrance facilities” because the wireless carrier is **a** telecommunications carrier. SWBT cannot interpret the Agreement to leave an entire category of network **elements** outside the definition of any UNE.

2. SWBT’s Policies Under the Existing Agreement Require EPN to Order Facilities to Cell Sites as Loops

It is well established under Texas law that the parties’ conduct in performing their contractual obligations before a dispute arose is evidence of the correct interpretation of any ambiguous terms in that contract.’ In this case, SWBT has established by its course of performance under the existing Agreement that it interprets the definition of “loop” in the UNE Appendix **as** including circuits that terminate at facilities occupied by other telecommunications carriers, **as** long as the facility does not include a switch. Although the definition of “loop” is **not** ambiguous, any doubt as to the correct interpretation of that definition should be **removed** by SWBT’s consistent course of performance before June 2002.

(a) SWBT Refuses to Provide Facilities to Wireless Carrier Locations as Entrance Facilities

Since the filing of the Waller Creek complaint that formed the basis for the Commission’s *Waller Creek Reconsideration Order* and the Revised Arbitration Award in Docket 20268, SWBT has disputed Waller Creek’s, now EPN’s, ability to obtain facilities to carrier locations as entrance facilities. SWBT has insisted that if there is no *carrier* switch present at the customer location it cannot be an “entrance facility” and has required EPN to order unbundled loops when

⁴¹ See, e.g., *E. H. Perry & Co. v. Langbehn*, 252 S.W. 472,481 (Tex. 1923) (“where a contract is ambiguous in its terms, a construction given it by the parties thereto and by their actions thereunder, before any controversy has arisen as to its meaning, with knowledge of its
(continued)

serving carrier locations. SWBT prefers a “loop” designation because it generally charges more for loops. Now that EPN is attempting to order those loops, SWBT is unilaterally changing its rules and claiming that the facilities are not **loops**.

SWBT admits its current policy is to refuse to provision entrance facilities to **carrier** locations unless a switch is present. In fact, SWBT has programmed its OSS to reject **UDT** entrance facility service orders that do not include a switch CLI **code**.⁴² EPN has vigorously contested this policy, showing that carrier locations where telecommunications carriers aggregate traffic should be classified as entrance facilities regardless of the presence of a switch.⁴³ SWBT now claims that facilities to CMRS carrier cell sites are not loops. SWBT’s contradictory positions are evident from the record in Docket 25188. For example, in its initial brief in that arbitration, SWBT stated that “Unless there is a SWBT or EPN switch at both ends of the facility, the facility is deemed a **loop**.”⁴⁴ The Commission should hold SWBT to its position and require that SWBT allow EPN to order facilities to carrier locations **as** loops.

(b) SWBT’s Internal Systems Recognize Cell Sites as Loop Addresses

The fact that SWBT has designed its internal records to recognize wireless carrier cell sites as loop addresses is further evidence of SWBT’s practice under the existing Agreement. For example, its Plant Layout Records make no distinction between cell sites and other customer

terms, will, when reasonable, be adopted and enforced by the courts”); *Atlantic Richfield Co. v. ANR Pipeline Co.*, 768 S.W.2d 711, 783 (Tex. Ct. App. 1989).

⁴² ~~Marías~~ Affidavit at ¶ 11.

⁴³ Docket No. 25188, EPN Initial Br. at 201-207.

⁴⁴ Docket No. 25188, SWBT Initial Br. at **53**, n.166 quoting Silver Rebuttal (SWBT Exhibit 20) at **15**. As if this did not make its position clear, SWBT then said the same thing again: “[i]f there is no SWBT or EPN switch, the circuit must be considered a loop.” *Id.* at **53**, n.168 quoting Silver Rebuttal (SWBT Exhibit 20) at 17.

locations (where SWBT does not dispute it has an obligation to provide UNE loops).⁴⁵ In addition, **SWBT's** mechanized Operation Support Systems that process CLEC orders are set up to recognize cell sites as loops, thus allowing CLEC orders for loops to such addresses to flow **through** SWBT's systems without manual **intervention**.⁴⁶

Most of EPN's orders for UNE **DSI** loops have flowed **through** SWBT's system without a problem. SWBT provisioned approximately 83 UNE **DSI** loop orders to EPN's national level wireless carrier customer's cell sites for EPN without **issue**.⁴⁷ In several cases, however, the address that the national level wireless carrier customer provided EPN differed from the address SWBT had assigned to the cell site. Because cell sites are frequently located at locations where there is no traditional postal or street address, when the wireless facilities were first installed, SWBT and the carrier personnel worked together to define a street address for the cell site so SWBT's internal system could process **orders**.⁴⁸

When such address discrepancies arose on EPN's orders for loops to cell sites, SWBT LSC personnel worked with EPN to match up the addresses and allow the orders to flow through to provisioning, where SWBT then provisioned the UNE loops.⁴⁹ In several of these instances SWBT possessed information that EPN's customer was a wireless carrier and that further indicated the service location was a cell site. ~~In June of 2002~~, SWBT changed its policy and refused to cooperate with EPN to match the addresses in its system to the addresses EPN's

⁴⁵ Manias Affidavit at ¶ 9.

⁴⁶ Manias Affidavit at 76.

⁴⁷ Manias Affidavit at ¶ 6.

⁴⁸ Manias Affidavit at ¶ 6.

⁴⁹ Id. at ¶ 7.

wireless carrier customer provided EPN.⁵⁰ SWBT should not be allowed to simply refuse to identify the addresses it has in its OSS for EPN, or any other CLEC.

3. The Unbundled Access Sought By EPN Is Consistent With the Public Interest

Unbundled access to facilities serving cell sites will promote the FTA's goal of increasing competition in all telecommunications markets. This Commission has demonstrated extraordinary leadership in promoting competition and should exert its leadership in this instance as well. By providing wireless carriers with a competitive choice for their access services, wireless carriers can in turn focus more resources on innovation and pricing to bring better service to more Texas consumers. When carriers have a choice to avoid SWBT's monopoly tariff pricing and terms, all Texas consumers win.

As explained in the affidavit of Pantios Manias, wireless carriers extensively rely on ILEC facilities to transport their telecommunications traffic. For most CMRS carriers, the only wireless part of the network is the last mile connection to the mobile phone.⁵¹ CMRS networks generally have two critical points where calls are processed and transported. The first is the Mobile Switching Center or Mobile Telephone Switching Office ("MTSO). The MTSO contains centralized equipment that controls the operations of base stations located at cell sites. The equipment at the MTSO monitors the connection status of the calls in its geographic area and will hand off calls from one base station or cell site to another to maintain the caller's connection. In each metropolitan area where a CMRS carrier maintains service the carrier will establish several MTSOs. Each MTSO will then be connected to multiple cell sites through the

⁵⁰ *Id.* at ¶ 8.

⁵¹ Manias Affidavit at ¶ 12.

ILEC's ubiquitous network. In addition the MTSOs also provide the connection between the wireless carrier and the Public Switched Telephone Network ("PSTN"). Each of these connections is traditionally made using wireline telecommunications facilities. CMRS *carriers* regularly obtain special access service from the ILEC to connect their cell sites to the MTSO, and to connect their MTSOs together.⁵²

In each metropolitan area there can be hundreds of cell sites. For instance in the Dallas-Fort Worth area, one major wireless carrier has approximately 410 cell sites.⁵³ Each of these cell sites will usually require 1 or 2 DS1 connections to the closest SWBT central office. It would be extraordinarily expensive for a new entrant to build a facility to provide a DSI without having the scope and scale the ILEC has through its ubiquitous network and its near monopoly hold on telecommunications services in the region.⁵⁴ The economic equation is even more skewed because the customer (the CMRS carrier) is not going to choose a supplier for one DS1, but for all DS1s to all of its cell sites? It would require an enormous investment of capital and time, in order to construct such a network that would duplicate the network the ILEC already has in place.⁵⁶

For that same reason there are no alternative sources of supply for these connections. Not even the wireless carriers, that generally have greater resources than most CLECs, have chosen to try and overbuild the ILEC's ubiquitous transport network to connect its cell sites to its

⁵² Id. at ¶¶ 12-14.

⁵³ Id. at ¶ 13.

⁵⁴ Id. at ¶¶ 14-16.

⁵⁵ Id. at ¶ 14.

⁵⁶ Id. at ¶ 14-16.

MTSOs. Instead the wireless carriers rely **on** the ILEC's expensive special access offering, **and** there is no competition for the services they **require**.⁵⁷

EPN can provide that competition and will provide it if it is allowed. **SWBT**, however, **is** using every means at its disposal to block EPN's ability to serve these customers. In **this** instance **SWBT**'s strategy is simple: use definitional games to deny EPN access to the same facilities **SWBT** uses to provide special access service. **SWBT** appears to know that the delay in providing EPN's customer with the **26** loops that **SWBT** refuses to provision can affect EPN's reputation for customer service and that if **SWBT** delays enough it could poison the relationship between EPN and its national level wireless carrier customer. The Commission should not allow this policy to continue unchecked and should require **SWBT** to provision the facilities to CMRS carrier cell sites as UNEs.

Even **SWBT** recognizes the potential that wireless service offers for competitive local service to Texas Consumers. **SWBT**'s corporate parent SBC has submitted comments to the FCC's regarding its Triennial Review of the Unbundling Obligations **of** Incumbent LECs that claimed wireless competition for local exchange customers **is** here. SBC states that:

[t]hree years ago, the Commission characterized mobile telephones as a "promising alternative that might one day become a viable alternative[] to the incumbent's wireline loop facilities." That day has arrived. **A** recent study found that one in five cell phone users use cell phones as their primary phones. **As** of the end of last year, wireless phones had displaced fully 10 million wireline access lines. By 2005, wireless phones are expected to replace 30 to 35 percent **of** second and additional wireline access lines.⁵⁸

⁵⁷ *Id.* at ¶¶ 14-15.

⁵⁸ *Triennial Review of Section 251 Unbundling Obligations of Incumbent LECs*, CC Docket 01-338, Comments of SBC at 102 (**FCC**, filed April 5, 2002) (internal citations omitted).

The unfortunate fact remains that wireless carriers are largely dependent on the ILEC for the critical wireline inputs to connect the pieces of the wireless carrier's network. In reality, most of the wireless network is carried over the ILEC's wires. As long as the ILEC can force the wireless carrier to pay the ILEC's inflated special access fees in order to obtain those inputs the wireless carriers **are** unlikely to ever develop into a viable replacement for the incumbent in the mass market local exchange. What is needed is vigorous competition both at the retail end from wireless carriers and vigorous competition for the wholesale inputs that will allow the wireless carriers to offer innovative services and lower prices making it a more viable competitor to the ILEC. Unless freed from the requirement to purchase RBOC special access it is unlikely that will ever happen. **SWBT's** idea of local competition ~~from~~ wireless carriers is those carriers reselling SWBT special access. The Commission has an interest in fostering greater competition for the inputs wireless carriers use.⁵⁹ Competition for these inputs will lower the carriers' costs, allowing them to reduce their rates to the benefit of Texas consumers.

B. RELIEF REQUESTED

1. The Commission Should Find that the Agreement Requires SWBT to Provide Circuits to Wireless Carrier Cell Sites as UNEs

In both its response to SWBT's Complaint and in its Counterclaim, EPN has demonstrated that the *Waller Creek Reconsideration* Order, the terms of EPN's current Agreement, § 251(c)(3) of the FTA, sound competition policy, and SWBT's own practices in dealing with EPN should lead the Commission to conclude that under the Agreement, EPN may obtain facilities to cell site as UNE loops.

⁵⁹

Likewise, the Commission has an interest in fostering competition through *fixed* wireless technology as well as mobile wireless. It is conceivable that SWBT could raise the same arguments it uses here to deny fixed wireless carriers nondiscriminatory access to UNEs as well.

This case does not merely affect EPN's disputed orders for service to one customer, but all orders for UNEs to carrier cell sites. Currently, there is no competition for the provisioning of DS1 facilities. In the past, wireless carriers could **only** connect their cell sites to their Mobile Telephone Switching Centers ("MTSO") and connect **their** MTSO to the Public Switched Telephone Network, by paying SWBT's exorbitant special access rates for those facilities. Now EPN and carriers like EPN can provide the **kind** of competition that will permit wireless carriers to have a choice in procuring DSI facilities. This will occur only if these carriers are permitted to compete. The Commission should not impede competition for these facilities by permitting SWBT unilaterally to avoid its unbundling obligations.

The Commission should therefore deny SWBT's Complaint on the merits (unless, **as** discussed below, the case becomes moot), and instead enter a final order declaring that EPN is entitled to order, and SWBT is required to provide, loops terminating at cell sites **as** unbundled network elements.

2. The Commission Should Grant Interim Relief Requiring SWBT to Provide Unbundled Access to Facilities Serving Wireless Carrier Cell Sites

As discussed above, pursuant to P.U.C. PROC. R. § 22.328(a), the Commission should **is-**sue an Interim Ruling that requires SWBT to continue providing EPN with UNE loops to cell sites for the duration of the instant proceeding. Such relief is consistent with SWBT's practices prior to its June, 2002 refusal to provide these loops to EPN. The relief is likewise appropriate because the Commission has previously ordered SWBT to allow EPN to use its Agreement to obtain UNEs to serve any other telecommunications provider, including wireless carriers. Nor is SWBT burdened by this relief because EPN has paid SWBT and will continue to pay SWBT the agreed-upon price for any such elements SWBT provides EPN. In the unlikely event that the

Commission were to find that SWBT is entitled to charge a higher rate for these circuits, SWBT could be compensated by ~~truing-up~~ the bills at a later date.

Any inconvenience to SWBT while it is being compensated for its provision of unbundled loops is clearly outweighed by the catastrophic harm to EPN and the resulting damage to telecommunications competition in Texas that will result if SWBT is allowed to refuse to provide EPN with unbundled access to wireless carrier cell sites.

Prior to June 2002, SWBT provisioned **DSL** UNE loops to cell sites without question. SWBT can not now change course and stop such practice, including refusing to verify the addresses in its OSS. The Commission should remain firm that SWBT must provision **as** UNEs now and litigate later. It also should be clear that this policy does not allow SWBT to demand payment of the Special Access tariff rate, either into SWBT's pockets or into an escrow account. As explained in more detail below, such a requirement is clearly harmful to EPN, and the lack of such payment does not harm SWBT. The harm to EPN and more importantly to Texas consumers, in the form of less competition, less innovation, and higher prices is clearly greater.

SWBT **has** argued that EPN is not seeking to preserve the status quo because this is the first time EPN has ordered loops to cell sites.⁶⁰ **This** argument is grossly misleading. EPN **has** ordered UNE loops to premises occupied by telecommunications caniers on numerous occasions, even though those premises were not cell sites, and **SWBT** has provisioned those circuits. As noted above, EPN ordered these circuits **as** loops because SWBT has previously refused to

⁶⁰ *Complaint and Request for Interim Ruling of El Paso Networks. LLC for Post Interconnection Agreement Dispute Resolution with Southwestern Bell Telephone Company*, Docket 25004, *Petition of El Paso Networks. LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company*, Docket 25188, Response of Southwestern Bell to EPN's Request for emergency Action under Proc. R. 22.78(c) and to Preserve the Status Quo (October 29, 2002) at 6.

process orders to non-switch sites as entrance facilities. The fact that the current orders ~~terminate~~ at cell towers does not make them materially different ~~from~~ other orders that SWBT has ~~ac-~~
~~cepted~~.⁶¹ In fact, if there has been any change in the parties' existing practice and procedure, it is that SWBT has refused to provide EPN facilities it has previously provided to similar locations, and has refused to work with EPN to resolve address issues in connection with the requested locations.

(a) Interim Relief Is Necessary **to** Prevent Harm to EPN and Substantially Outweighs Any Burden Imposed on SWBT by an Order **Requiring** Access

As discussed above, SWBT's refusal to provide UNEs to fulfill EPN's customer's orders for DSL loops **to** its cell sites precludes EPN ~~from serving~~ its customer. EPN has demonstrated a sound factual and legal basis **on** which the Commission should award interim relief. Unless the Commission requires SWBT to verify cell site addresses and **to** provision UNEs to these cell sites, EPN will be precluded from fulfilling the current orders from its wireless carrier customer, precluded from fulfilling future orders for this customer and other wireless ~~carrier~~ customers, and generally unable **to** compete in this segment of the Texas telecommunications market.

EPN expects that without unbundled access to these UNEs, EPN will be unable to provide service to **an** entire class of customers, some of whom have already ordered such service from EPN and ~~others~~ who have expressed a sincere interest in obtaining such service in the near future. Without access to these facilities **on** an unbundled basis, EPN will be unable to respond to the needs of its customers, and its position in the market will be severely and permanently

⁶¹ Significantly, the provisions of the Agreement that SWBT relies upon do not refer to cell towers at all; they refer to "end user premises." The *status quo* is that SWBT previously treated that term as encompassing locations containing telecommunications carrier equipment, except for switches.

damaged. The customers will undoubtedly be required to purchase services ~~from~~ SWBT, perhaps under long-term contractual commitments, and, absent immediate relief, EPN will be unable ~~to regain~~ the lost business even if it prevails ~~on the merits~~ of ~~this~~ case at a later time.

Further, the Commission should require that SWBT provision facilities to ~~CMRS~~ carrier cell sites ~~as~~ UNEs without paying the special access prices for each UNE into an escrow account ~~as~~ proposed by SWBT. First, a requirement that EPN pay the difference between the UNE loop rate and the Special Access tariff rate into an escrow fund is tantamount to denying EPN access to the UNE, since EPN would incur the same economic cost as if ordering Special Access service.⁶² The economics of SWBT's proposal do not change by placing the difference between UNEs and Special access into escrow—EPN loses use of that capital whether the money is in an escrow account or in ~~SWBT's~~ pocket.⁶³ If EPN accedes to SWBT's demand, ~~and~~ orders special access circuits, it will remain liable for the charges for those circuits, ~~unless~~ and until ~~this~~ Commission ~~rules~~ otherwise. Because SWBT's special access tariff charges are based on term commitments, EPN could become liable for charges for the full term provided by the tariff, not just until a Commission ruling. EPN simply cannot serve its customers if it must use special access and SWBT is aware of that fact. There is ~~no~~ incentive for wireless carriers to use EPN's service if EPN must charge them the same rate for the DS1 ~~as~~ SWBT charges in its tariff. As Mr. Manias suggests in his affidavit, EPN would need to also recover its marketing and administration costs in addition to those costs incurred by purchasing SWBT's tariffed access service.⁶⁴ As ~~a~~ result, EPN would be forced to charge ~~higher~~ prices than SWBT's special access rates ~~to~~

⁶² Manias Affidavit at ¶ 17.

⁶³ *Id.*

⁶⁴ *Id.*

avoid taking a loss, and it would be unlikely any wireless carrier would pay EPN a higher rate for a special access circuit than the rate it could get from SWBT.

Second, if EPN accepts SWBT's demand and provides service to its customer, it would incur a contractual obligation to its customer to provide the facilities at a certain price for a specified period of time. If EPN is forced to purchase the circuits **as** special access, EPN would be forced to absorb the price difference over the course of that contract term (which could exceed the minimum term commitment required under the SWBT tariff). EPN could also incur added contractual liability to the customer if EPN could not provide service for the full contractual term.

Third, EPN's escrow liability would not be limited to the 109 disputed orders, because these **are** fewer than 10% of the DSIs EPN's customer currently purchases from SWBT. **This** wireless carrier alone purchases 1800 DSIs to its cell sites from SWBT that the carrier may elect to switch to EPN or another competitive carrier.⁶⁵ If EPN were forced to order the remaining approximately 1700 DSIs **as** special access, and commit to a minimum term for those orders **as** well, the dollar amounts EPN would have at risk would increase significantly. Moreover, EPN's current customer is not the only wireless carrier in Texas. There are an estimated 12,000 potential DSI loops used by wireless carriers in the tier one markets in Texas (Austin, San Antonio, Dallas, Fort Worth, and Houston). EPN hopes to expand its business; but, simply to serve 1/12 of the estimated market for DSIs to cell sites for one year, EPN would have to pay approximately \$1.5 million dollars into **escrow**.⁶⁶

⁶⁵ The carrier may also elect to have **both** SWBT and EPN **as** sources of supply to provide improved diversity for its network.

⁶⁶ Manias Affidavit, ¶ 17.

In short, SWBT's demands would make it unprofitable for EPN to offer any additional service to its potential customer, or to any other wireless carrier, until **this** dispute is resolved. It will be economically irrational for EPN to provision additional circuits on which it could suffer a financial loss in the event of an adverse ruling by **this** Commission (however unlikely such a result may be). These customers **will** not wait around forever for EPN to serve them. ~~Instead,~~ they will likely enter into their own long-term commitments to SWBT, in order to obtain favorable tariff prices, and this would allow SWBT to lock up this segment of the market for years to come. Even if EPN prevails on the merits ~~after~~ a full hearing, it will never be able to recover the business opportunities that were lost to it while litigation was pending.

Notwithstanding EPN's objection to tying up capital in a third party escrow account in order to obtain UNEs, as a gesture of its good faith, EPN is willing to place a lump sum of \$6,500 into a third party escrow account to cover any damages that the Commission might award to SWBT ~~after~~ a hearing on the merits. However, **this** amount would be a fixed **sum**, not an open-ended obligation to make escrow payments **as** proposed by SWBT in its October 11, 2002 letter.

If the Commission permits SWBT to deny EPN unbundled access to facilities that serve wireless customer cell sites, the harm to EPN would be extensive, irreparable and would likely thwart competition in an important segment of the market. SWBT, however, will not be harmed if EPN's requested emergency relief is granted because EPN will be paying Commission approved rates for use of those loops. As is evident from SWBT's offer to allow EPN to obtain these loops at special access rates, the only conceivable harm SWBT may suffer is monetary in nature; in the unlikely event the Commission would subsequently determine that **SWBT** was

entitled to collect a higher rate, the Commission could remedy the problem by initiating a proceeding to “true-up” the costs.

(b) SWBT’s Complaint May Soon be Moot

The Commission might not need to hear the merits of this case because the Agreement on which a decision would be based will expire **soon**. EPN and **SWBT** are currently arbitrating a new Interconnection Agreement before the Commission. As discussed above in Section II, EPN and SWBT should have a new Interconnection Agreement in place in the next several months. However, interim relief **is** still necessary because, **as** explained in the preceding section, EPN would otherwise suffer substantial and irreparable competitive harm if it were unable to obtain UNE loops during the period that the existing Agreement will remain in effect.

The parties’ new Agreement, currently being arbitrated in Docket No. **25** 188, contains language that, dependent on the outcome of the disputed language currently before the Arbitrators, would potentially resolve **this** issue. The parties agreed on the following definition:

GT&C 1.1.51 **“End Users”** means a third-party residence or business that subscribes to Telecommunications Services provided by any of the Parties at retail. As used herein, the term “End Users” does not include any of the Parties to this Agreement with respect to any item or service obtained under this Agreement.

In contrast to the definition in the existing Agreement, the new definition includes the term “at retail,” which suggests that the term end user is limited to users who purchase service at retail for their **own** use rather than at wholesale for use in reselling service to another user. However, the parties also submitted competing definitions of the term “customer,” which would more clearly delineate how EPN could order UNEs. In this context, SWBT has offered the same misguided interpretation of the *Waller Creek Reconsideration Order* that it has relied upon in the

instant Complaint, suggesting the Commission somehow required the presence of an end user in order for EPN to be allowed to use UNEs to provide wholesale service.⁶⁷

SWBT PROPOSAL	EPN PROPOSAL
<p>GT&C 1.1.38 “Customer” means any third party, including but not limited to another telecommunications carrier that obtains Telecommunications Service from either Party, whether at wholesale or retail. The terms “End-User” and “Customer” are not interchangeable for purposes of this Agreement. Based on the definition of End User below in Section 1.1.51, all End Users are Customers but not all Customers are End Users. EPN can use UNE dark fiber (or other UNEs) to carry traffic for any other <u>local</u> telecommunications provider regardless of who is serving the retail, local end use customer. EPN may purchase UNEs and use them, <u>subject to the requirements of Appendix UNE</u>, in combination, or in combination with its own facilities, to provide wholesale services to other <u>local</u> telecommunications providers, regardless of who is serving the retail, local end use customer.</p>	<p>GT&C 1.1.38 “Customer” means any third party, including but not limited to another tele-communications carrier that obtains Telecommunications Service from either Party, whether at wholesale or retail. The terms “End-User” and “Customer” are not interchangeable for purposes of this Agreement. Based on the definition of End User below in Section 1.1.51, all End Users are Customers but not all Customers are End Users. EPN can use UNE dark fiber (or other UNEs) to carry traffic for any other telecommunications provider regardless of who is serving the retail, local end use customer. EPN may purchase UNEs and use them, <u>alone or</u> in combination, or in combination with its own facilities, to provide wholesale services to other telecommunications providers.</p>

SWBT’s proposed language reflects its policy position that EPN should not be permitted to **use** UNEs to compete with **SWBT** to provide access services to other telecommunications carriers unless they **are** provisioning local exchange service. If the Commission, **as** it should, finds that such a narrow view of **SWBT**’s unbundling obligations undermines the FTA and the Commission’s pro-competitive decisions implementing that Act, then **this** dispute will be settled with regards to EPN’s new interconnection agreement.

The parties also dispute language in the definition of loop, **as** follows:

⁶⁷

EPN’s response to this argument is presented in Sections III.C and IV.A.(1)(a) above.

SWBT PROPOSAL	EPN PROPOSAL
UNE § 12.1.1 Pursuant to applicable FCC rules, a local loop Unbundled Network Element is a transmission facility between a distribution frame (or its equivalent) in an SWBT-TX Central Office and the loop demarcation point at a <u>End User</u> premises, including inside wire owned or controlled by SWBT-TX. Such control may or may not include the conduit that the cabling traversers. At any time, however, when SWBT-TX owns such cabling, such cabling will be considered as part of the unbundling obligations of this Agreement.	UNE § 12.1.1 Pursuant to applicable FCC rules, a local loop Unbundled Network Element is a transmission facility between a distribution frame (or its equivalent) in an SWBT-TX Central Office and the loop demarcation point at a <u>Customer</u> premises, including inside wire owned or controlled by SWBT-TX. Such control may or may not include the conduit that the cabling traversers. At any time, however, when SWBT-TX owns such cabling, such cabling will be considered as part of the unbundling obligations of this Agreement.

The only difference between the definitions is EPN's proposal to use the term "Customer premises" and SWBT's proposal to use the term "End ~~User~~ premises." EPN's language is consistent with the Arbitrators' finding in Docket 25188 that **EPN** may use UNEs to provide access services to telecommunications carriers.⁶⁸

The parties similarly dispute language regarding the definition of transport, entrance facilities, and wire center. The parties offered the following competing language on these two .similar but distinct issues:

SWBT PROPOSAL	EPN PROPOSAL
UNE 17.1 The Interoffice Transport network element is defined as SWBT-TX interoffice transmission facilities dedicated to a particular customer or carrier that provides telecommunications between wire centers owned by SWBT-TX, and a CLEC or a third party telecommunications carrier acting on behalf of CLEC <u>where the CLEC is collocated</u> , between switches owned by SWBT-TX, and a CLEC or a third party telecommunications carrier acting on behalf of CLEC, <u>where the CLEC is collocated</u> .	UNE 17.1 The Interoffice Transport network element is defined as SWBT-TX interoffice transmission facilities dedicated to a particular customer or carrier that provides telecommunications between wire centers owned by SWBT-TX, <u>an ILEC or CLEC</u> or a third party telecommunications carrier acting on behalf of CLEC between switches owned by SWBT-TX, <u>an ILEC or CLEC</u> or a third party telecommunications carrier acting on behalf of CLEC.

⁶⁸ Docket No. 25188, Revised Award at Issue 3, pp. 14-15.

SWBT PROPOSAL	EPN PROPOSAL
<p>UNE 17.6.2 Entrance Facility – is defined as a circuit from a SWBT-TX switch or Wire Center to a telecommunications carrier (including EPN) has either a wire center or a switch. EPN is allowed to obtain entrance facilities between SWBT-TX wire centers or switches and wire centers or switches of third party telecommunications carriers <u>where collocated</u> acting pursuant to a contractual relationship with EPN. If the SWBT facility is not being connected to a wire center or switch at the third party carrier location, then the third party would be considered an end user, not a carrier, and therefore the facilities would fall under the definition of a loop rather than UDT or Entrance Facilities. UDT cannot extend to end user third parties.</p>	<p>UNE 17.6.2 Entrance Facility – is defined as a circuit from a SWBT-TX switch or Wire Center to a telecommunications carrier (including EPN) has either a wire center or a switch. EPN is allowed to obtain entrance facilities between SWBT-TX wire centers or switches and wire centers or switches of third party telecommunications carriers acting pursuant to a contractual relationship with EPN. There is no reanirement that the switch or wire center have a CLLI code as a prerequisite for ordering a UNE Entrance Facility. If the SWBT facility is not being connected to a wire center or switch at the third party carrier location, then the third party would be considered an end user, not a carrier, and therefore the facilities would fall under the definition of a loop rather than UDT or Entrance Facilities. UDT cannot extend to end user third parties.</p>
<p>GT&C 1.1.141 “Wire Center” is the location of one or more local switching systems. A point at which End User’s loops within a defined geographic area converge. Such local loops may be sewed by one (1) or more Central Office Switches within such premises.</p>	<p>GT&C 1.1.141 “Wire Center” <u>denotes a building or space within a building that serves as an aggregation point on a given carrier’s network, where transmission facilities and circuits are connected or switched. SWBT-TX’s Wire Center can also denote a building in which one or more Central Offices, used for the provision of Exchange Semces and access semces, are located.</u></p>

Read together, EPN’s language in these three provisions of the new Agreement would permit EPN to obtain entrance facilities to wireless carrier **cell** sites because they are an “aggregation point” on the wireless carrier network. Conversely, if **SWBT**’s language were approved, EPN would likely have to continue ordering UNEs to carrier locations other than those that **have** switches, **as** UNE loops. In short, if the commission resolves these disputes in the proceeding regarding EPN’s new interconnection agreement with SWBT, the issues presented in the instant complaint regarding the existing agreement would be moot.

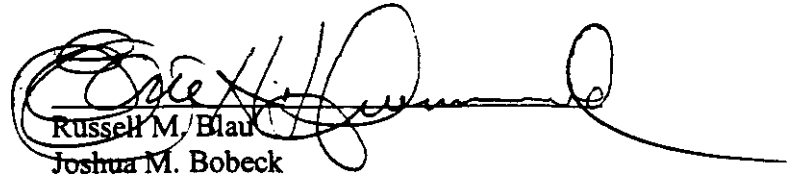
V. CONCLUSION

EPN respectfully requests that the Commission issue **an** interim ruling requiring SWBT to provision EPN's orders for UNEs to **CMRS** carrier cell sites while this proceeding is pending. In addition, EPN respectfully requests that the interim order require **SWBT** to provide EPN, upon request, with the cell site addresses that reside in SWBT's records.

EPN ~~further~~ requests that the Commission deny SWBT's Complaint, and instead (if the issue does not become moot due to adoption of a new Agreement) declare that the parties' Interconnection Agreement requires **SWBT** to provide loops terminating to cell sites **as** unbundled network elements, so that EPN may continue providing wholesale telecommunications services to wireless carriers using UNEs obtained from **SWBT**, consistent with the **Commis-**sion's ruling in *Waller* Creek.

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Respectfully submitted,



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**COUNSEL FOR EL PASO
NETWORKS, LLC**

November 13, 2002

CERTIFICATE OF SERVICE

The undersigned ~~certifies~~ that a copy of the foregoing **Response, Counterclaim and Request For an Interim Ruling of El Paso Networks, LLC** was served upon all ~~parties~~ of record via **U.S.**Mail, facsimile or hand delivery ~~on this~~ 13th day of November, 2002.

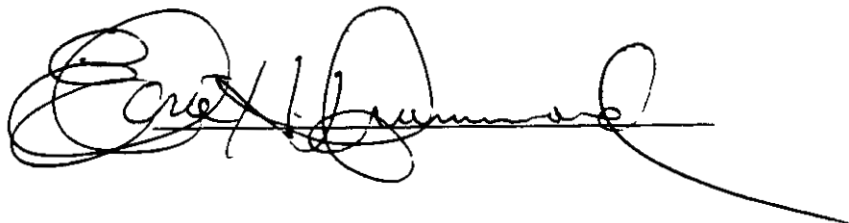
A handwritten signature in black ink, appearing to read "Eric H. Drummond", written over a horizontal line.

EXHIBIT 1

Letter from Mark Chamberlain, SWBT to Tony Sanna, EPN



October 11, 2002

RECEIVED

OCT 18 2002

EL PASO GLOBAL
NETWORKS COMPANY

VIA E-MAIL AND FIRST-CLASS MAIL

Mr. Tony Sanna
Carrier Relations
El Paso Networks
1001 Louisiana Street
Houston, Texas 77002

Subject: Request for UNE DSI's to [REDACTED] cell sites

Dear Mr. Sanna

Until SWBT's Local Service Center rejected EPN's latest 25 orders for DSI loops because of address mismatches, SWBT was unaware that EPN was ordering facilities as UNE Loops that did not qualify for that treatment. As you are aware, EPN's current interconnection agreement, as well as applicable FCC rules, define unbundled loops as:

a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC.

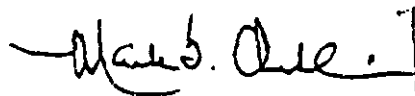
See 47 CTR 51.319(a) and EPN ICA. Attachment 6, Section 4.1

From the information provided by EPN, it appears that the "DSI loops" EPN has been ordering do not satisfy the definition of a loop under either governing law or the parties' agreement. The "loops" are actually facilities terminating to sites - a fact which EPN has confirmed. [REDACTED] in no way qualifies as an "end user" under either applicable state and federal law or the parties' ICA.

Now that the facts are known, SWBT will not provision these 25 new UNE "loop" orders submitted by EPN without ensuring that its interests are protected. Rather than reject the orders and require EPN to re-place the orders as ASRs under the applicable access tariff, SWBT proposes the following interim solution to the parties' apparent dispute over whether the "loop" orders are proper. SWBT agrees to provision the 25 "loop" orders upon the condition that EPN pays for the loops at the applicable UNE rate and also pays into escrow with a third party escrow agent mutually acceptable to both parties the difference between the applicable UNE rates for the facilities and the rate that would apply to the facilities if they were (properly) ordered under the FCC Tariff 73. This arrangement will enable the parties to resolve their dispute before the appropriate authority, while maintaining the status quo as to the amounts SWBT believes it is rightfully entitled to charge and collect. Please notify the undersigned immediately if

EPN accepts this condition so that the parties can work out the logistical details and next steps for pursuing and resolving their apparent dispute.

Although it appears that EPN's previous 109 orders for DS1 loops may also be subject to rescission and repricing under applicable special access rates, terms and conditions, SWBT will not take such action until the parties' dispute is resolved. By leaving the prior 109 orders and DS1 "loops" in place, however, SWBT does not, in any way, waive or otherwise compromise its right to seek rescission and/or repricing of those orders and provisioned facilities as to these and the additional 25 orders discussed in this letter, and reserves the right to pursue any and all appropriate remedies in the future.



Mark S. Chamberlin
Director-Account Management